FILED
98 150 JUL 14 1998
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

ADAPTIVE POWER SOLUTIONS, LLC,

Petitioner,

-v-

HUGHES MISSILE SYSTEMS COMPANY
and RAYTHEON COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES K. T. HUNTER, ESQUIRE
Counsel of Record
10100 Santa Monica Boulevard
Suite 1100
Los Angeles, California 90067
☎ (310) 277-6910
Attorneys for Petitioner

Appellate Service: Curry & Taylor (800) 222-8738/Appellate@webtv.com ♻

32 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A GROUP BOYCOTT BY THE ONLY TWO DEFENSE CONTRACTORS AUTHORIZED TO MANUFACTURE A SPECIFIC WEAPONS SYSTEM OF A SUPPLIER OF ONE OF THE SYSTEM'S KEY COMPONENTS FOR THE PURPOSE OF PUNISHING THE SUPPLIER'S ATTEMPT TO RAISE PRICES IS INELIGIBLE FOR *PER SE* TREATMENT EVEN IF (1) THE BOYCOTT CUTS OFF ACCESS TO A MARKET NECESSARY TO ALLOW THE SUPPLIER TO COMPETE, (2) THE BOYCOTTING FIRMS POSSESS A DOMINANT MARKET POSITION AND (3) THE BOYCOTT IS NOT JUSTIFIED BY PLAUSIBLE ARGUMENTS THAT IT ENHANCED OVERALL EFFICIENCY OF COMPETITION?

II. EVEN IF SUCH A GROUP BOYCOTT IS PROPERLY SUBJECT TO RULE OF REASON ANALYSIS, MAY A VICTIM ESTABLISH THE REQUISITE "INJURY TO COMPETITION" BY PRESENTING EVIDENCE OF THE BOYCOTTERS' MARKET POWER INSTEAD OF, AND AS A SURROGATE FOR, ACTUAL ANTICOMPETITIVE EFFECTS?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Statement Of Jurisdiction 1

Constitutional Provisions And Statutes Involved 1

Statement Of The Case 1

Reasons For Granting The Writ 6

I. The Opinion Misconstrues *Northwest* When It Improperly Restricts Application Of *Northwest's* Criteria For *Per Se* Treatment Of Group Boycotts To Horizontal Group Boycotts. 6

II. The Opinion Similarly Erred In Limiting *Per Se* Treatment Of Price-Fixing Conspiracies To Horizontal Agreements Among Competitors To Fix The Prices Paid By Their Customers. 7

III. Even Under The Rule Of Reason, "Injury To Competition" May Be Estimated By Presenting Evidence Of The Boycotters' Market Power Instead Of, And As A Surrogate For, Actual Anticompetitive Effects. 9

Conclusion 11

Appendix

Exhibit A - Circuit Court Opinion 1a
Exhibit B - District Court Opinion 16a

TABLE OF AUTHORITIES

Page

Cases

Adaptive Power Solutions, LLC v. Hughes Missile Systems Company and Raytheon Company, 141 F.3d 947 (9th Cir. 1998) 1

Associates General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529 fn. 19 (1983) 8

Business Electronics v. Sharp Electronics, 485 U.S. 717, 724 (1988) 8

FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 2019, 90 L.Ed.2d 445 (1986) 3, 8, 10

FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-1 (1986) 9

Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948) 8

Northwest Wholesale Stationers v. Pacific Stationers & Printing Co., 472 U.S. 284 (1985) 2, 3, 5, 6, 7

Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3rd Cir. 1996) 9-11

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n. 59 (1940) 7, 8

Statutes

15 U.S.C. §1 (1994) 1

28 U.S.C. §1254 1

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Adaptive Power Solutions, LLC v. Hughes Missile Systems Company and Raytheon Company*, 141 F.3d 947 (9th Cir. 1998), (Exhibit A, p. 1a). The judgment of the United States District Court for the Central District of California is Exhibit B, p. 15a. The order granting the motion of defendants for summary judgment as to plaintiff's federal anti-trust claim is Exhibit C, p. 16a.

Statement Of The Basis Of Jurisdiction Of The Supreme Court

The statutory provision for this Court's jurisdiction is 28 U.S.C. §1254. The United States Court of Appeals for the Ninth Circuit issued its Opinion in this case on April 15, 1998. This petition was filed within 90 days of Opinion's issuance, and is timely.

Constitutional And Statutory Provisions Involved

Section 1 of the Sherman Act provides: "Every . . . conspiracy, in the restraint of trade or commerce among the several States, . . . is hereby declared to be illegal." 15 U.S.C. §1 (1994).

Statement Of The Case

Defendants Hughes Missile Systems Company and Raytheon Company are the only two firms that manufacture advanced medium range air to air missiles ("AMRAAM") for the Department of Defense. In June of 1995, when plaintiff Adaptive Power Solutions, LLC ("APS") was one of only two suppliers of an internal power supply system for the

AMRAAM missile known as the "A3", plaintiff raised its asking price for A3s to Raytheon from the previous price of $2,750 per unit to $3,900 per unit. Raytheon refused to buy A3s from plaintiff at this price.

Plaintiff then tried to sell A3s to Hughes for $2,758, but Hughes refused to buy them. For the purpose of the summary judgment motion whose granting was affirmed by the Ninth Circuit in the Opinion below, defendants did not contest plaintiff's allegation that "because Raytheon was 'angered at APS's attempt to charge Raytheon an increased price for A3s,' Raytheon convinced Hughes to join it in refusing to deal with APS 'for the purpose and with the intent of driving APS out of the market for the manufacture of A3s.'" Opinion, 141 F.3d at 949, Appendix A, p. 3a-p. 4a. The result of the group boycott was that plaintiff was not only driven from the market for the manufacture of A3s but forced into a general liquidation of its business and assets in September 1995.

On April 1, 1996, plaintiff filed a complaint which, following two amendments, alleged that defendants' group boycott had violated Section 1 of the Sherman Act, in addition to two pendent state claims.

On September 20, 1995, Raytheon moved for summary judgment on the ground that plaintiff was unable to establish injury to competition. This motion was later joined in by Hughes.

Plaintiff opposed the motion on three grounds. First, plaintiff argued that a triable issue of fact existed as to whether defendants' group boycott merited *per se* invalidation under Section 1 of the Sherman Act (1) under the standards which this Court announced for *per se* illegal boycotts in *Northwest Wholesale Stationers v. Pacific Stationers & Printing*

Co., 472 U.S. 284 (1985) and/or (2) by reason of the alleged boycotters' price fixing motivation. In support of this argument, plaintiff presented uncontradicted evidence that defendants' group boycott of APS exhibited all the characteristics which *Northwest* identified as indicative of *per se* illegal boycotts -- namely:

> 1. the boycott cut off APS' access to a market (i.e., the market of potential purchasers of A3s) necessary to enable APS to stay in business;
>
> 2. the boycotting firms (i.e., Raytheon and Hughes) together possess a dominant market position in the market of potential purchasers of A3s; and
>
> 3. not only have defendants never offered any argument that their boycott was justified by any resultant enhancement in overall efficiency or competition, but defendants' denials of the existence of the alleged boycott necessarily preclude any such contention.

Plaintiff also adduced undisputed evidence that APS's alleged injury flowed directly from the anticompetitive aspect of defendants' group boycott.

Second, plaintiff argued that, even if rule of reason analysis applied to defendants' group boycott, this Court's decision in FTC *v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) allowed plaintiff to satisfy its burden of establishing "injury to competition" by adducing evidence with respect to defendants' market power as a "surrogate" for actual detrimental effects. In support of this argument, plaintiff

produced evidence detailing defendants' market power as follows:

1. A3s are a unique product which are essential to the manufacture of a specific AMRAAM missile contracted for by the United States Department of Defense ("DOD"), and no other products are interchangeable, much less reasonably interchangeable, for either A3s or the specific AMRAAM missiles which incorporate A3s;

2. A3s are manufactured and assembled into AMRAAM missiles (which are sold only to DOD) only in the United States, which constitutes the appropriate geographic market within which to assess one or more firms' "market power" in the markets for the manufacture of A3s or AMRAAM missiles which incorporate A3s;

3. as the only firms awarded DOD contracts for the manufacture of the specific AMRAAM missiles containing A3s, defendants are the only two firms who are actual or potential purchasers of A3s, and together possess 100% of the market power in the market for the manufacture of the specific AMRAAM missiles which incorporate A3s;

4. within the last three years, there has never been more than two manufacturers of A3s at any one time who were "qualified" to provide A3s to defendants, and the barriers to new entrants into the market for the manufacture of A3s are extremely high, and

5. defendants are multi-billion dollar goliaths, each of which by itself dwarfs the combined size of all

of the competitors in the market for the manufacture of A3s.

Third, even though plaintiff had yet to be allowed any discovery from defendants, plaintiff pointed to substantial evidence of actual anticompetitive efforts on the market for the manufacture of A3s caused by defendants' group boycott.

The district court granted defendants' motion for summary judgment on October 21, 1996. In its order (Exhibit C, p. 16a), the district court concluded that APS could not establish a triable issue of fact in support of its Sherman Act 1 claim because (1) as a matter of law, the per se rule only applies to horizontal group boycotts and (2) as a matter of fact, the requisite "injury to competition" for rule of reason liability could not be established in light of (a) the perceived counter-intuitiveness of APS' claim and (b) the purported ease of entry into the subject market. Final judgment was entered on November 18, 1996.

Plaintiff timely appealed to the Ninth Circuit Court of Appeals, which affirmed the district court's judgment. More particularly, the panel held: (1) only horizontal group boycotts whose purpose is to injure competitors can qualify for *per se* treatment under the *Northwest* criteria, (2) only a price-fixing conspiracy among competitors who agree among themselves to fix the prices charged to customers can qualify for *per se* treatment and (3) in rule of reason cases, market power can never suffice to establish the requisite "injury to competition" in the absence of evidence of actual anticompetition efforts.

ARGUMENT

I. THE OPINION MISCONSTRUES *NORTHWEST* WHEN IT IMPROPERLY RESTRICTS APPLICATION OF *NORTHWEST'S* CRITERIA FOR *PER SE* TREATMENT OF GROUP BOYCOTTS TO HORIZONTAL GROUP BOYCOTTS.

As the Opinion itself recognizes (141 F.3d at 949-950, Appendix A, p. 5a - 7a), *Northwest* is the seminal decision addressing when *per se* analysis should be applied to group boycotts. *Northwest*, however, establishes that determining which group boycotts should be subjected to the *per se* rule depends not on general categorizations, but a careful and particularized examination of the specific economic characteristics of the boycott in question:

> "Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.' [Citations omitted.] In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete. . . and frequently the boycotting firms possessed a dominant position in the relevant market. [Citations omitted.] In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the

> likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." (*Northwest*, 472 U.S. at 294; emphasis added.)

The Opinion concedes (141 F.3d at 950, Appendix A, p. 6a) that plaintiff presented evidence that defendants' alleged group boycott exhibited all of the characteristics which *Northwest* identified as indicative of *per se* illegal boycotts. Yet the panel asserts that this Court's above-quoted statement that "[c]ases to which this Court has applied the *per se* approach have generally [emphasis added] involved joint efforts by a firm or firms to disadvantage competitors" must properly be construed as mandating a brightline restriction of the *per se* approach to horizontal group boycotts.

The crucial phrase "have generally involved" cannot reasonably be interpreted to mean "must always involve" -- particularly where, as in *Northwest*, the entire tenor and purport of this Court's holding was a rejection of a rigid, formalistic test for determining when the *per se* approach should be applied to group boycotts. This Court said what it meant in *Northwest* when it announced the criteria which should be applied to any group boycott asserted to warrant *per se* invalidation; and the Opinion's attempt arbitrarily to restrict the scope of those criteria by adding a formalistic gloss thereon should be rejected.

II. THE OPINION SIMILARLY ERRED IN LIMITING *PER SE* TREATMENT OF PRICE-FIXING CONSPIRACIES TO HORIZONTAL AGREEMENTS AMONG COMPETITORS TO FIX THE PRICES PAID BY THEIR CUSTOMERS.

As stated by this Court in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59 (1940), price is the "central nervous system of the economy". As a result, both horizontal and vertical price-fixing agreements are illegal *per se*. *Socony*, 310 U.S. at 218; *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 724 (1988). Further, it is irrelevant whether the prices being fixed are those paid to suppliers rather than those paid by purchasers. *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *Associates General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 fn. 19 (1983) ["In *Mandeville* . . ., the Court held that growers of sugar beets could maintain a treble-damages action against refiners who had allegedly conspired to fix the price they would pay for beets. Although previous price-fixing cases had involved agreements among sellers to fix sales prices, the Court readily concluded that the Act applied equally to an agreement among competing buyers to fix purchase prices."]

Yet the Opinion holds, without any citation to authority, that defendants' agreement to boycott APS for the purpose of punishing APS's attempt to raise the price of A3s does not qualify for *per se* treatment because "[t]his is not a case in which competitors try to fix their prices." (Opinion, 141 F.3d at 950, Appendix A, p. 7a) In point of fact, however, plaintiff's action asserts a horizontal conspiracy among competitors to fix "their prices" -- and the fact it is their suppliers' prices rather than their customers' prices is of no moment. *Mandeville, supra.* In addition, the law has been, and should remain, settled that defendants' price-fixing conspiracy would merit *per se* treatment even if it were deemed vertical in nature.

III. EVEN UNDER THE RULE OF REASON, "INJURY TO COMPETITION" MAY BE ESTIMATED BY PRESENTING EVIDENCE OF THE BOYCOTTERS' MARKET POWER INSTEAD OF, AND AS A SURROGATE FOR, ACTUAL ANTICOMPETITIVE EFFECTS.

In *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-1 (1986), this Court voted that market power constitutes a "surrogate" for actual anticompetitive effects as follows:

> "Since the purpose of inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output', can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects."

In *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3rd Cir. 1996) the Third Circuit Court of Appeals further expanded on the above-quoted remark as follows:

> "In rule of reason cases, the plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets. *Brown Univ.*, 5 F.3d at 668. The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects, such as reduction of output, increase in price, or

> deterioration in quality of goods and services. *Id.* Due to the difficulty of isolating the market effects of the challenged conduct, however, such proof is often impossible to make. *Id.* Accordingly, the courts allow proof of the defendant's 'market power' instead. *Id.* Market power -- the ability to raise prices above those that would prevail in a competitive market -- is essentially a '"surrogate for detrimental effects."' *Id.* at 668-69 (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61, 106 S.Ct. 2009, 2019, 90 L.Ed.2d 445 (1986))." (*Id.*, 79 F.3d at 1367; emphases added.)

Thus, even assuming, *arguendo*, that the rule of reason applied to defendants' boycott, plaintiff was entitled to establish the requisite "injury to competition" by proof of defendants' market power rather than actual anticompetitive effects in the market for the manufacture of A3s. Yet even though the Opinion properly notes that "[t]here is no question Raytheon and Hughes had market power" (141 F.3d at 951), the panel implicitly rejected *Orson's* persuasive interpretation of this Court's decision in *FTC* in holding that plaintiff was required to establish actual anticompetitive efforts regardless of defendants' established market power.

CONCLUSION

In the Opinion, the Ninth Circuit inexplicably fails to follow the clear dictates of this Court regarding when group boycotts and price-fixing conspiracies are to be subjected to *per se* treatment. Then the Ninth Circuit exacerbates those failures by its implicit rejection of, and direct conflict with, the Third Circuit's well-reasoned *Orson* decision regarding the availability of market power as an alternative means of establishing "injury to competition". The cumulative effect of all these errors is to afford *carte blanche* to the buyers of any given product to conspire to destroy any supplier who does something any one of them does not like, including, in particular, an attempt to raise prices.

The Court should grant *certiorari* to review this important matter. Following that review, this Court should reverse the Ninth Circuit and order that defendants' motion for summary judgment should be denied.

Respectfully submitted,

s/JAMES K.T. HUNTER
10100 Santa Monica Boulevard
Suite 1100
Los Angeles, California 90067
Telephone: (310) 277-6910
Telefax: (310) 201-0760
Attorneys for Petitioner
Adaptive Power Solutions, LLP

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-55010
D.C. No. CV-96-02310-HLH
OPINION

ADAPTIVE POWER SOLUTIONS, LLC,
a California limited liability corporation,

Plaintiff-counter-defendant-Appellant,

v.

HUGHES MISSILE SYSTEMS COMPANY, a Delaware corporation;

Defendant-Appellee,

RAYTHEON COMPANY, a Delaware corporation,
Defendant-counter-claimant-Appellee.

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
March 5, 1998--Pasadena, California

Filed April 15, 1998

Before: Melvin Brunetti, David R. Thompson and

Thomas G. Nelson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

COUNSEL

James K.T. Hunter, Los Angeles, California, for plaintiff-counter-defendant-appellant Adaptive Power.

Rodney J. Stone, Gibson, Dunn & Crutcher, Los Angeles, California, for defendant-appellee Raytheon Company.

Christopher J. Heck, Kirkland & Ellis, Los Angeles, California, for defendant counter-claimant-appellee Hughes Missile Systems Co.

OPINION

THOMPSON, Circuit Judge:

OVERVIEW

Adaptive Power Solutions, LLC ("APS"), a defense industry subcontractor, sued Hughes Missile Systems Company ("Hughes") and Raytheon Company (collectively the "defendants") for allegedly violating section 1 of the Sherman Act and related state law claims. APS alleged that

the defendants joined in a concerted refusal to deal with APS to punish APS for attempting to raise prices, which drove APS out of business. The district court granted summary judgment in favor of the defendants on the Sherman Act claim and dismissed the state law claims without prejudice. We have jurisdiction under 28 U.S.C. S 1291 and we affirm.

FACTS

Raytheon and Hughes are the only two firms that manufacture advanced medium range air to air missiles ("AMRAAMs") for sale to the Department of Defense.

In June 1995, the plaintiff APS acquired all of the assets of Sigmapower, Inc. Prior to that acquisition, Sigmapower had manufactured sophisticated electronic equipment, primarily for use in the defense industry. In particular, Sigmapower had manufactured an internal power supply system known as the "A3" for the AMRAAM missile. At the time that APS bought Sigmapower's assets, Sigmapower supplied A3s to Raytheon. Another electronic subcontractor, Oeco Corporation, supplied A3s to Hughes. There were no other suppliers of A3s.

Even before the Sigmapower acquisition was completed, APS began to negotiate with Raytheon for the sale of A3s. In these negotiations, APS raised its asking price for A3s from the previous price of $2,750 per unit to $3,900 per unit. Raytheon refused to buy A3s from APS at the new price.

APS then tried to sell the A3s to Hughes for $2,758, but Hughes refused to buy them. For the purpose of this summary judgment motion, the defendants do not contest APS's allegation that because Raytheon was "angered at APS's attempt to charge Raytheon an increased price for

A3's," Raytheon convinced Hughes to join it in refusing to deal with APS "for the purpose and with the intent of driving APS out of the market for the manufacture of A3's."

When APS could not sell its A3s to either Raytheon or Hughes, APS got out of the A3 business. This occurred in September 1995. Oeco then became the only remaining supplier of A3s. But not for long.

The next month, Raytheon awarded a contract for A3s to Signal Technologies Keltec Corporation ("ST Keltec"), a new entrant in the market for the manufacture and sale of A3s. ST Keltec manufactured sophisticated electronic equipment, primarily for the defense industry.

At about this same time, October 1995, APS sold to SoraPower, Inc., another new entrant in the A3 manufacturing market, the assets needed to manufacture A3s (but did not sell to SoraPower APS's inventory of completed A3s). In March or April 1996, SoraPower tried to get Hughes to sign a contract to buy A3s from it, but Hughes refused.

APS filed this lawsuit against Hughes and Raytheon in April 1996, alleging a violation of section 1 of the Sherman Act and related state law claims. Raytheon later moved for summary judgment, and Hughes joined in that motion. APS opposed the motion and moved for a continuance so it could conduct further discovery. The district court denied APS's motion for a continuance, and granted summary judgment in favor of the defendants on the Sherman Act claim. The court then dismissed without prejudice the state law claims. APS now appeals.

A. The Raytheon/Hughes Conspiracy

For the purpose of the summary judgment motion, the parties assume that Raytheon and Hughes conspired to drive APS from the business of supplying A3s. APS argues this conspiracy is a group boycott or refusal to deal which is per se unreasonable.

[1] Section 1 of the Sherman Act provides:"Every . . . conspiracy, in restraint of trade or commerce among the several States, . . . is hereby declared to be illegal." 15 U.S.C. S 1 (1994). A restraint of trade is per se unreasonable, when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984) (citation omitted). If a court finds that a restraint is not per se unreasonable, it analyzes the restraint under the rule of reason to determine "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986) (citation omitted).

[2] The Supreme Court has applied the per se approach to cases that "have generally involved joint efforts by a firm or firms to disadvantage competitors . . . . " Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 293-94 (1985) (emphasis added). Three characteristics are indicative of a per se illegal boycott:

> (1) the boycott cuts off access to a supply, facility, or market necessary to enable the victim firm to compete; (2) the boycotting firm possesses a dominant market position; and (3) the practices are not justified by plausible arguments that they enhanced overall efficiency or competition.

Hahn v. Oregon Physicians' Serv., 868 F.2d 1022, 1030 (9th Cir. 1988) (summarizing Northwest Wholesale Stationers, Inc., 472 U.S. at 294). Absent such a showing,"the category of activities comprising group boycotts `is not to be expanded indiscriminately.' " Id. (quoting Indiana Fed'n of Dentists, 476 U.S. at 458).

Framing its argument to fit within the Hahn formulation, APS argues that the defendants' conspiracy was per se illegal because (1) it cut off APS's access to the market for the sale of A3s; (2) the defendants are the only manufacturers of AMRAAMs so, not only are they the dominant market, they are the only market for the sale of A3s; and (3) the defendants have failed to state a plausible argument that their conspiracy enhanced competition.

[3] This argument overlooks the Court's description of a group boycott as one which "disadvantages competitors." Northwest Wholesale Stationers, Inc., 472 U.S. at 294. "[T]he per se approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." Indiana Fed'n of Dentists, 476 U.S. at 458 (emphasis added). Raytheon and Hughes were competitors, but there were no other competitors in the AMRAAM market.

Their alleged conspiracy did not disadvantage a competitor; thus, their boycott does not fit the per se category.

Seizing upon the word "generally" in Northwest and Indiana Fed'n of Dentists, APS argues the present case is the exception to the Northwest formulation of a per se group boy cott as "generally involv[ing] joint efforts by a firm or firms

to disadvantage competitors." Northwest, 472 U.S. at 294. In support of this argument, APS relies on Fashion Originators' Guild of America v. Federal Trade Comm'n, 312 U.S. 457 (1941). This reliance is misplaced.

In Fashion Originators, dress and textile manufacturers who sold original designs agreed to boycott retailers that dealt with manufacturers who sold copies of those original designs.

Even though the manufacturers boycotted retailers, with whom they had a vertical relationship, the purpose of the boy cott was to injure competitors, those manufacturers who sold copies. Id. at 467 ("the aim of petitioners' combination was the intentional destruction of one type of manufacture and sale which competed with Guild members"). In sum, Fashion Originators involved manufacturers who agreed to a group boycott of retailers to disadvantage competing manufacturers. It was precisely the kind of boycott described in Northwest. It is not the kind of boycott asserted here.

[4] APS also argues the Raytheon/Hughes boycott is a price-fixing conspiracy, because Raytheon and Hughes conspired to boycott APS to drive it from the A3 market as punishment for attempting to raise its price for A3s. The defect in this argument is a factual one. This is not a case in which competitors try to fix their prices. This is a case in which manufacturers refuse to deal with a high-priced supplier. This has nothing to do with a price-fixing conspiracy among competitors who agree among themselves to fix their prices.

[5] We conclude the Raytheon/Hughes conspiracy did not trigger the per se rule of a group boycott. The district court properly chose to apply the rule of reason.

B. Rule of Reason

[6] Under the rule of reason, to decide whether a challenged restraint is unreasonable under the Sherman Act, "[t]he focus is on actual effects that the challenged restraint has had on competition in a relevant market." Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 (9th Cir. 1991). APS argues it has shown injury to competition by establishing the defendants' market power and by showing actual injury, either one of which, it contends, is sufficient. We disagree.

1. Market Power

[7] "Proving injury to competition in a rule of reason case almost uniformly requires a claimant to prove the relevant market and to show the effects of competition within that market." See, e.g., American Ad Management, Inc. v. GTE Corp., 92 F.3d 781, 789 (9th Cir. 1996) (emphases added) (quoting Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988) (which cites numerous Ninth Circuit cases for support)). In American Ad Management, we required not only a definition of the market, but also a showing that the business practice injured competition by increasing the prices consumers paid in that market. American Ad Management, 92 F.3d at 790.

[8] The American Ad Management principle is applicable to this case. APS must not only establish that the defendants had market power, it must also establish that the defendants' boycott injured competition. There is no question Raytheon and Hughes had market power. We consider, therefore, whether their boycott injured competition.

2. Injury to Competition

[9] Antitrust laws are designed to protect competition, not competitors. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990). "[T]he alleged injury must be caused by a reduction, rather than an increase, in competition resulting from the restraint." Three Movies of Tarzana v. Pacific Theatres, Inc., 828 F.2d 1395, 1400 (9th Cir. 1987).

The parties disagree as to whether, as a result of the Raytheon/Hughes refusal to deal with APS, the number of competitors for the manufacture and sale of A3s increased, remained the same, or decreased due to a temporary decline. Their disagreement stems from their differing definitions of "competitors."

[10] APS defines a competitor as a qualified manufacturer of A3s; to become qualified, Hughes or Raytheon must review the capability of a manufacturer and approve the manufacturer as a source from which Hughes or Raytheon would buy A3s. In contrast, Hughes and Raytheon define a competitor as a manufacturer that has the equipment to produce A3s and indicates an interest in manufacturing and selling them.

[11] Under either definition, prior to June 1995 there were two competitors, Oeco and APS's predecessor, Sigmapower. There are now at least two competitors, Oeco and ST Keltec, and there may be three if SoraPower is included in the count. In determining the count, the relevant chronology of A3 man ufacturers entering, leaving and remaining in the market is significant.

The relevant chronology is as follows: In June 1995, APS bought Sigmapower's assets and labelled itself a competitor. So, according to APS, there continued to be two competitors: APS and Oeco. In September 1995, APS "was driven " out of the A3 manufacturing market and sold its A3 production

equipment to SoraPower. The next month, October 1995, Hughes awarded ST Keltec, a new entrant into the market, a contract to produce A3s. ST Keltec actually began producing A3s sometime later in 1995. It is not clear from the evidence exactly when ST Keltec became "qualified."

The other new entrant, SoraPower, approached Hughes in March or April of 1996 to try to obtain a contract to supply Hughes with A3s, but was not successful. Oeco continued to manufacture and sell A3s all along.

The defendants argue that competition was actually increased because in place of the original two competitors, three emerged: Oeco, ST Keltec and SoraPower. As the defendants point out, APS asserts that it immediately became a competitor when it bought Sigmapower's "technology, equipment and inventory." SoraPower later bought APS's equipment, although not its inventory. It may be that if APS immediately became a competitor, so did SoraPower.

[12] But, even if SoraPower did not become an immediate competitor, there was no injury to competition. ST Keltec became qualified or operational within four to ten months after APS left the market, and Oeco continued to supply A3s all along. To constitute an injury to competition, the restraint must be "of significant magnitude," Bhan, 929 F.2d at 1413, and "more than trivial." Gough v. Rossmoor Corp., 585 F.2d 381, 389 (9th Cir. 1978). Here it was not.

[13] The extent of the restraint can be compared to the magnitude of the restraint we considered in a recent section 2 monopolization case. There, in the context of an alleged section 2 Sherman Act violation for monopolization, we "insist[ed] on a preliminary showing of significant and more-than-temporary harmful effects on competition. " American

Prof'l Testing Svc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 108 F.3d 1147, 1151 (9th Cir. 1997) (internal quotation and citation omitted) (emphasis added). Any harmful effect on competition in the present case was, at most, temporary.

A temporary decline in competition was considered by the District of Columbia Circuit in Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 251 (D.C. Cir 1987). There, the court found that a supplier of wax figures did not have a monopoly when the only other supplier could not deliver the product for one year.

[14] APS argues that a four- to ten-month lag in production of A3s is more serious than a one-year lag in wax figure production because the United States government needs completed missiles in order to be prepared to fight a war. This may be, but APS has shown at most only a temporary decline in the number of competitors, a decline which is not significant enough to be classified as an injury to competition under the Sherman Act. See Id.

[15] APS also argues that it can establish antitrust injury by showing other anticompetitive effects, such as a reduction in output and quality. Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508-09 (9th 1989) (in a market which "is both narrow and discrete and the market participants are few," the loss of a competitor may injure competition if there is an effect on price or availability, the allocation of resources, or the opportunities for market entry). We reject this argument in the context of this case. Just as a temporary decline in the number of competitors is not a significant restraint of trade, neither is a related temporary decline in quantity, quality, or efficiency.

C. Economic Sense

[16] Antitrust claims must make economic sense. Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 468 (1992). Here, the district court found APS's claim of antitrust injury to be "counter-intuitive." The district court characterized the situation as one in which the two consumers of A3s conspired to punish APS by creating, at least temporarily, monopoly power in the remaining supplier. See also Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 211 (9th Cir. 1987) (it would be "illogical" for a large firm to restrict competition in a market for services which the large firm requires).

[17] APS contends that even though the Raytheon/Hughes boycott of APS may appear at first glance to make no economic sense, it does in fact make economic sense in the long run. APS relies on a statement we have made concerning predatory pricing: "A long-run strategy requires the predator to drive rivals from the market, or discipline them sufficiently so that they do not act as competitors normally should." Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1433-34 (9th Cir. 1995) (emphasis added). Of course, APS was not a competitor of Raytheon or Hughes, so they gained nothing by driving APS from the market, except perhaps the satisfaction of having done so.

APS, however, characterizes the Raytheon/Hughes conspiracy as a conspiracy to injure competition in the A3 manufacturing market. According to APS, Hughes and Raytheon were willing to accept some short-term discomfort in order to discipline their suppliers to insure continued low prices. APS asserts that small subcontractors in the defense industry are dependent upon large defense firms. These subcontractors are careful to charge low prices in order to keep the large defense

firms happy. Because new entrant APS was unaware of how things worked in the industry, it attempted to raise its price. Rather than merely refusing to pay the higher price, the larger firms chose to make an example by punishing APS, in order to "discipline" the remaining defense industry suppliers into charging low prices, some even below cost.

[18] APS's argument misconstrues the uncontroverted evidence. APS presented no evidence whatsoever that Raytheon and Hughes boycotted APS to punish other subcontractors. To the contrary, the evidence establishes without contradiction that Raytheon and Hughes boycotted APS to punish it. The evidence is also uncontroverted that this did not injure competition, even if we accept APS's contention that there was only one A3 manufacturer supplying A3s for a matter of months after APS quit the business.

[19] The district court got it right. APS's argument makes no economic sense and there was no relevant evidence to sup port it anyway.

D. Rule 56(f) Motion

As part of its opposition to Raytheon's summary judgment motion, APS requested a continuance under Federal Rule of Civil Procedure 56(f) so it could conduct further discovery. The district court denied APS's request.

[20] The district court did not abuse its discretion. See Qualls ex rel. Qualls v. Blue Cross of Cal., Inc., 22 F.3d 839, 844 (9th Cir. 1994). The discovery APS sought would not have precluded summary judgment. See id. (district court does not abuse its discretion when the additional discovery would not have precluded summary judgment).

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADAPTIVE POWER SOLUTIONS, LLC,
a California limited liability corporation,

Plaintiff

v.

RAYTHEON COMPANY, et al,
Defendant.

No. CV96-2310-HLH (AJWx)
ORDER DISMISSING ACTION

Plaintiff's claims are dismissed as to Raytheon Company and Hughes Missile Systems Company.

IT IS SO ORDERED.

Date: October 21, 1996.

s/Harry L. Hupp

ORDER (also, if applicable, findings and memorandum opinion):

The motion of defendant Raytheon Company and Hughes Missile Systems Company for summary judgment as to the federal anti-trust claim is granted. the remaining state law claims are dismissed without prejudice for lack of supplemental jurisdiction. Order and judgment signed and filed this date.

The court adheres to the view expressed at the time of the motion to dismiss that this a "rule of reason" case. It is now determined that there is no triable issue of fact on that question and the rule of reason is applicable. The "per se" rule is designed for situations where the object of the boycott is a competitor. Here, if plaintiff's allegations are true, the object of the combination between Raytheon and Hughes is a supplier to one of them and a potential supplier to the other. This is not a "per se" situation. (Northwest Wholesale Stationers ' 85 472 US 284, 86 LEd2d 202.)

Since "rule of reason" analysis applies, plaintiff must show an effect on competition which is beyond mere injury to plaintiff. Plaintiff has shown none. the background is without dispute in the factual record. Raytheon and Hughes Missile each sell Amraam missiles to Department of Defense as the only suppliers of such. Each missile requires an A3 power supply. There were two suppliers of the A3 to Raytheon and Hughes -- OECO and Sigmapower. APS

Supreme Court, U.S.
F I L E D
AUG 24 1998
CLERK

98 150

No. ~~98-105~~

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ADAPTIVE POWER SOLUTIONS, LLC,
Petitioner,

v.

HUGHES MISSILE SYSTEMS COMPANY
AND RAYTHEON COMPANY,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Counsel of Record
DAVID A. BATTAGLIA
RODNEY J. STONE
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents

QUESTION PRESENTED

Whether the courts below correctly applied well-settled antitrust doctrines in holding (1) that the rule of reason, rather than the *per se* rule, applied to respondents' alleged refusal to deal and (2) that, under the rule of reason, petitioner failed to establish the requisite injury to competition.

RULE 29.6 STATEMENT

Respondent Raytheon Company has no parent companies or non-wholly owned subsidiaries. Respondent Hughes Missile Systems Company is now known as Raytheon Missile Systems Company and is a wholly owned subsidiary of Ratheon Company. Raytheon Missile Systems Company has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

STATEMENT 1

REASONS FOR DENYING THE PETITION 3

CONCLUSION 6

TABLE OF AUTHORITIES

Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) 4,5

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 4

Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358 (3d Cir. 1996) 5

United States v. Johnston, 268 U.S. 220 (1925) 4

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 98-105

ADAPTIVE POWER SOLUTIONS, LLC,

Petitioner,

v.

HUGHES MISSILE SYSTEMS COMPANY
AND RAYTHEON COMPANY,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Hughes Missile Systems Company and Raytheon Company respectfully submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Adaptive Power Solutions, LLC.

STATEMENT

1. Respondents Raytheon and Hughes are the two manufacturers of advanced medium range air-to-air missiles ("AMRAAMs") for sale to the Department of Defense. Pet App. 3a. One of the components of the AMRAAM missile is an internal power supply known as the "A3." *Id.*

In June 1995, petitioner acquired the assets of Raytheon's sole A3 supplier in a foreclosure sale. Pet App. 3a. After petitioner informed Raytheon that it would not provide any

A3s to Raytheon unless Raytheon agreed to a substantial price increase, Raytheon awarded its A3 contract to a new entrant into the A3 business. *Id.* at 4a. At approximately the same time, petitioner unsuccessfully offered to sell A3s to Hughes, which unlike Raytheon already had another supplier under contract, for a lower price. *Id.* at 3a-4a.

Petitioner sued respondents in April 1996, alleging, *inter alia*, a violation of Section 1 of the Sherman Act. Pet App. 4a. Specifically, petitioner alleged that it was unsuccessful in its attempt to sell A3s to Hughes because Raytheon convinced Hughes to join it in refusing to deal with petitioner "for the purpose and with the intent of driving [petitioner] out of the market for the manufacture of A3's." *Id.* Petitioner alleged that it went out of business due to its inability to sell A3s to Raytheon and Hughes. *Id.*

2. The district court granted summary judgment to respondents on petitioner's Section 1 claim on the ground that, under the rule of reason, there was no injury to competition. Pet App. 16a.

3. The court of appeals affirmed. The court first held that the district court had correctly held that the *per se* rule, which conclusively presumes certain categories of restraints of trade to be illegal because they virtually always restrict competition, did not apply to the restraint alleged in this case. Pet App. 5a-7a. The court of appeals then applied traditional rule of reason analysis and determined that the district court had correctly found that there was no injury to competition. The court of appeals thoroughly reviewed the evidentiary record relating to the chronology of suppliers entering, leaving and remaining in the market:

> In June 1995, [petitioner] bought Sigmapower's assets and labelled itself a competitor. So, according to [petitioner], there continued to be two competitors: [petitioner] and Oeco. In September of 1995,

> [petitioner] "was driven" out of the A3 manufacturing market and sold its A3 production equipment to SoraPower. The next month, October 1995, [Raytheon] awarded ST Keltec, a new entrant into the market, a contract to produce A3s. ST Keltec actually began producing A3s sometime later in 1995. It is not clear from the evidence when ST Keltec became "qualified" [by the DOD to product A3s]. The other new entrant, SoraPower, approached Hughes in March or April 1996 to try to obtain a contract to supply Hughes with A3s, but was not successful. Oeco continued to manufacture and sell A3s all along.

Pet. App. at 9a-10a. Based on this review, the court of appeals determined that, due to the demonstrated ease of entry in the A3 market, respondents' actions had not caused any injury to competition and, in fact, competition may have actually increased. *Id.* Moreover, the court of appeals agreed that the district court "got it right" when it concluded that petitioner's claim of injury to competition made "no economic sense." *Id.* at 13a.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari is based entirely on the premise that the courts below erroneously applied well-settled principles of antitrust law to the particular facts of this case. Petitioner presents no unsettled questions of law or actual conflicts among federal appellate decisions, petitioner's contentions are meritless, and the questions presented are entirely factbound, particularly in light of the unique characteristics of the industry involved. The petition should be denied because it meets none of the criteria traditionally considered by this Court in granting discretionary review. *See* this Court's Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

1. Petitioner's principal contention is that the court of appeals erred in concluding that the *per se* rule did not apply to respondents' alleged refusal to deal. *See* Pet. 6-8. The court of appeals relied on this Court's decision in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985), in refusing to apply the *per se* rule on the ground that the alleged group boycott by Raytheon and Hughes did not disadvantage a competitor. Pet. App. 6a. Petitioner acknowledges that *Northwest Wholesale Stationers* is "the seminal decision addressing when *per se* analysis should be applied to group boycotts" (Pet. 6), but contends that the court of appeals "misconstrue[d]" that decision by "adding a formalistic gloss thereon." *Id.* at 6-7.

But the court of appeals merely followed the general rule that application of the *per se* rule is unwarranted where, as here, the challenged conduct was not directed at a competitor. *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) ("the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor"). Petitioner does not take issue with that general rule, but argues only that the court of appeals should have made an exception to it under the particular circumstances of this case. Such a factbound contention regarding the application of settled law does not warrant this Court's review.

2. Petitioner next complains that the court of appeals erred in holding that the alleged group boycott was not an unlawful price-fixing conspiracy. Pet. 7-8. As the court of appeals explained, "[t]he defect in this argument is a factual one" because this case "has nothing to do with a price-fixing conspiracy." Pet. App. 7a. Review of that factual determination is unwarranted. *See United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

3. Petitioner's final argument is that respondents' market power is a substitute for proof of actual anticompetitive effects under the rule of reason. Pet. 9-10. This contention is based on this Court's observation that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Fed'n of Dentists*, 476 U.S. at 460-61 (citations omitted). Petitioner would turn this well-settled antitrust principle on its head. While it makes perfect antitrust sense that a full-blown analysis of a defendant's market power is not necessary if the plaintiff can show actual detrimental effects on competition, it would make no legal or economic sense to allow a showing that respondents have market power -- and therefore have the *potential* to injure competition -- to defeat a showing that there have been no *actual* anticompetitive effects.

Contrary to petitioner's contention (*see* Pet. 9-10), the decision below does not conflict with *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358 (3d Cir. 1996), which also affirmed a grant of summary judgment on the ground that the plaintiff failed to prove injury to competition. The *Orson* court stated, in *dicta*, that market power can serve as a substitute for actual anticompetitive effect when, "[d]ue to the difficulty of isolating the market effects of the challenged conduct," proof of actual anticompetitive effect is "impossible to make." *Id.* at 1367. Regardless of the correctness of that statement, it has no application here. In this case, proof of actual anticompetitive effects was not impossible to make. Rather, as the courts below recognized, respondents affirmatively showed that there were *no* anticompetitive effects. Pet. App. 9a-10a, 16a.

4. This case presents a textbook example for the application of the rule of reason. The antitrust laws are for the benefit of competition, not competitors. The purpose of the *per se* rule is to characterize certain circumstances as *always* anticompetitive. Where, as here, there have been no anticompetitive effects as a result of the alleged restraint, the *per se* rule should not apply, nor should proof of market power be sufficient to show an injury to competition. The courts below engaged in a straightforward rule of reason analysis of the alleged restraint and correctly held, based on well-established antitrust principles, that there was no injury to competition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
DAVID A. BATTAGLIA
RODNEY J. STONE
MARK A. PERRY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents

August 24, 1998.